

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SCOTT K.,

Plaintiff,

v.

Civil Action No.
8:23-CV-090 (DEP)

MARTIN J. O'MALLEY,
Commissioner of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

SCHNEIDER & PALCSIK
57 Court Street
Plattsburgh, NY 12901

MARK SCHNEIDER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

JASON P. PECK, ESQ.

¹ Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.² Oral argument was conducted in connection with those motions on August 15, 2024, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

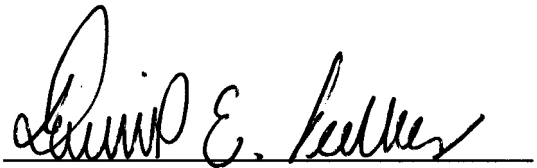
After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

² This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles
U.S. Magistrate Judge

Dated: September 3, 2024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
SCOTT KING

Plaintiff,

vs.

Civil Action No. 8:23cv090

MARTIN J. O'MALLEY,
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----X

Transcript of a Decision from a Teleconference
Hearing held on August 15, 2024, the
HONORABLE DAVID E. PEEBLES, United States Magistrate
Judge, Presiding.

A P P E A R A N C E S

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1 (The following is an excerpt of a
2 teleconference hearing held on 8/15/2024.)

3 THE COURT: All right. Fine. Thank you. Let me
4 just run through the background real quickly of this case.

5 Plaintiff was born in February of 1968. He is
6 currently 56 years of age, lives in Ellenburg Depot with his
7 mother. He stands 5-foot-7 inches in height, weighs
8 168 pounds.

9 The evidence is a little equivocal as to his
10 educational background. He testified, and there was a
11 statement that he ended his high school days in 10th grade
12 where he was in regular classes. That's at 322 and 65 of the
13 administrative transcript. There is also evidence he
14 received an IEP diploma and was in special ed classes.
15 That's at 79 and 1228. He is right-handed. He does not
16 drive, due to seizures and blackouts, as well as undergoing
17 multiple motor vehicle accidents.

18 Plaintiff worked as a hospital food service worker
19 for 27 years. It's a little equivocal as to when he last
20 worked. At one point it was suggested May of 2020, and
21 another October 29, 2020. In any event, he has not worked
22 since.

23 Plaintiff suffers from Type 1 diabetes, seizure
24 disorder, and generalized idiopathic epilepsy from undergoing
25 a childhood bout with meningitis. He has foot issues, vision

1 issues. He was hospitalized in November of 2019, in the
2 emergency room for a diabetes-related issue. He was -- he
3 suffered from diabetic ketoacidosis.

4 Mentally he suffers from variously described
5 conditions. Adjustment disorder, anxiety, obsessive
6 compulsive disorder.

7 In terms of activities of daily living, plaintiff
8 can dress, bathe, groom, does some meal preparation. He
9 cleans, he does laundry with his mother. He shops with his
10 mother or sister, reads, walks, watches television, plays
11 computer games. He has a hobby of woodworking with a scroll
12 saw and stated at one point he hoped to establish it as a
13 business.

14 Plaintiff applied for Title II benefits. The
15 application was made in November 1, 2020, alleging an onset
16 date of October 29, 2020, and claiming disability based on
17 seizures, worsening eyesight, and type 1 diabetes. That's at
18 321.

19 A hearing was initially conducted on October 27,
20 2021, by Mary Sparks, who subsequently retired before issuing
21 a decision. A second hearing was conducted on April 6, 2022,
22 by Administrative Law Judge Jude Mulvey. A decision was
23 rendered -- adverse decision, I should say, by ALJ Mulvey on
24 May 4, 2022. The Appeals Council of the Social Security
25 Administration denied plaintiff's application for review on

1 January 11, 2023, and specifically considered subsequently
2 submitted evidence, including school records and a
3 neuropsychological evaluation from Dr. Taher Zandi, finding
4 no basis to overturn the decision based on the new evidence.
5 This action was timely commenced on January 23, 2023.

6 In the decision, Administrative Law Judge Mulvey
7 applied the familiar five-step sequential test for
8 determining disability, finding substantial gainful --
9 counsel, I'm going to ask you to mute your phones, please --
10 finding that he had not engaged in substantial gainful
11 activity since October 29, 2020.

12 At step two, ALJ Mulvey concluded that plaintiff
13 suffers from severe impairments that impose more than minimal
14 limitations on his ability to perform work functions,
15 including diabetes type 1, a seizure disorder, and an
16 adjustment disorder rejecting neuropathy and other related
17 claims concerning plaintiff's feet, rejecting worsening
18 eyesight and hearing loss.

19 The Administrative Law Judge did go through a
20 mental assessment and did note that based on Dr. Hartman's
21 consultative examination, a diagnosis of adjustment disorder
22 that was indicated, and that the various other cognitive
23 neurodevelopmental and related complaints concerning
24 plaintiff's mental capacity and abilities have been
25 considered under that adjustment disorder umbrella and

1 specifically noted that all claimant's medically determinable
2 impairments, including those deemed not severe were
3 considered when assessing the claimant's residual functional
4 capacity or RFC.

5 At step three, the ALJ concluded plaintiff's
6 impairments do not meet or medically equal any of the listed
7 presumptively disabling conditions set forth at
8 commissioner's regulations.

9 At step four -- I'm sorry. First, there is a
10 determination based on the record that plaintiff was capable
11 of performing light work with the following exceptions. He
12 cannot climb ladders, ropes, or scaffolds; must avoid all
13 exposure to moving mechanical machinery and unprotected
14 heights; cannot drive as a part of job duties; can perform
15 simple, routine and repetitive tasks in a work environment
16 free from fast-paced production requirements and involving
17 only simple, work-related decisions and few, if any,
18 workplace changes; and can tolerate a low level of work
19 pressure defined as work not requiring multitasking, detailed
20 job tasks, significant independent judgment, a production
21 rate pace, sharing of job tasks, or anything more than
22 occasional contact with the public. Applying this RFC at
23 step four, the Administrative Law Judge concluded plaintiff
24 is incapable of performing his past relevant work as a food
25 service worker, hospital.

1 At step five, with the benefit of testimony from a
2 vocational expert, the Administrative Law Judge found that
3 there are positions in the local economy -- in the national
4 economy that plaintiff is capable of performing, including as
5 a silverware wrapper, marking clerk, and routing clerk, and
6 therefore concluded that he was not disabled at the relevant
7 times.

8 As the parties know, the Court's function is
9 limited to determining whether substantial evidence supports
10 the determination and correct legal principles were applied.
11 Obviously, it is a well-established standard and very
12 differential, as the Second Circuit has noted in *Brault vs.*
13 *Social Security Administration Commissioner*, 683 F.3d, 443
14 2012, later reiterated in *Schillo vs. Kijakazi* at 31 F.4th
15 64, Second Circuit 2022.

16 The plaintiff has raised several issues in a very
17 comprehensive, multifaceted challenges outlined in his brief.
18 First he challenges the step two determination and the
19 failure to include cognitive impairments, anxiety and
20 depression as severe impairments.

21 He next argues error in finding plaintiff's
22 disability was caused by noncompliance with prescribed
23 treatment. He alleges error in discounting plaintiff's
24 subjective reports of symptomology.

25 The fourth ground is alleged error in the

1 evaluation of medical opinions. He also challenges the RFC
2 determination. He attacks the step five determination and
3 the sufficiency of job numbers testified to by the vocational
4 expert as satisfying the Commissioner's burden at step five
5 and argues that new evidence should have been considered by
6 Social Security Administration Appeals Council, including the
7 neuropsychological evaluation report of June 8, 2022,
8 addressing first step two.

9 Obviously, the claimant must show that he or she
10 has a medically determinable impairment at step two that
11 rises to the level of a severe impairment, 20 CFR
12 404.1520(a)(4)(2). It does not reach the threshold of
13 severity where it does not significantly limit the claimant's
14 physical or mental ability to do basic work activities. And
15 of course it is a de minimus requirement intended only to
16 screen out the weakest of cases. A medically determinable
17 impairment by regulation must be established by objective
18 medical evidence from an acceptable medical source,
19 20 CFR 404.1521.

20 In this case, plaintiff has no history of
21 outpatient mental services. Dr. Hartman did opine that he
22 suffers from an adjustment disorder, which the Administrative
23 Law Judge did include at step two. Clearly, there was a
24 statement by Dr. Bret Hartman, the consultative examiner that
25 a mild neurocognitive disorder and a mild autism spectrum

1 disorder should be ruled out. Those, however, do not
2 constitute diagnoses.

3 Plaintiff argues that there was a duty to order
4 cognitive testing based on Dr. Hartman's opinion, but there
5 was -- Dr. Hartman did not recommend it and plaintiff did not
6 request it. In fact, the plaintiff's counsel said the record
7 was complete when asked by the Administrative Law Judge.

8 Dr. Taher Zandi, who issued a post-hearing
9 determination report found a developmental disorder of
10 scholastic skills and borderline intelligence. I am not sure
11 whether that qualifies as a diagnosis, but if it does, it
12 came after the ALJ's determination and therefore has to be
13 analyzed under the new evidence standard, which I will
14 address in a moment. But I find no error in -- at step two.
15 And, furthermore, if there was error, it is harmless because
16 the Administrative Law Judge proceeded to step three and
17 stated that she considered all of plaintiff's mental
18 impairments even those deemed not severe, and so that
19 suffices to establish harmless error. *Lorraine H. vs.*
20 *Commissioner of Social Security*, 2022 WL 4545541 from the
21 Northern District of New York, September 29, 2022.

22 In terms of noncompliance, this is an interesting
23 issue. The Administrative Law Judge noted plaintiff's
24 noncompliance, but it was, as part of a credibility -- what
25 we used to call credibility, part of the analysis of

1 plaintiff's subjective complaints. It was not in and of
2 itself relied upon as a basis to deny disability. There were
3 three areas of noncompliance cited: The refusal to take
4 insulin before rather than after meals. Plaintiff could not
5 avoid high sugar snacks. And he stopped using an InPen
6 Bluetooth device without explanation.

7 The failure to abide by prescribed treatment is a
8 proper consideration in addressing subjective complaints.
9 SSR 16-3P provides, quote, we will consider an individual's
10 attempts to seek medical treatment for symptoms and to follow
11 treatment once it is prescribed when evaluating while the
12 symptom intensity and persistence affect the ability to
13 perform work-related activities for an adult. It goes on to
14 state: If the individual fails to follow prescribed
15 treatment that might improve symptoms, we may find the
16 alleged intensity and persistence of an individual's symptoms
17 are inconsistent with the overall evidence of record. It's
18 also consistent with the finding in *Calabrese vs. Astrue*, 358
19 F. App'x 274, Second Circuit 2009, where when the so-called
20 back in the day, credibility assessment was addressed by the
21 Second Circuit, it was noted that plaintiff was noncompliant
22 in taking the medication that was prescribed by her doctors.

23 Plaintiff relies on SSR 18-3p, which addresses
24 initial denials of claims on this basis. He argues that the
25 reason he did not take insulin before rather than after

1 dinner was he was concerned about hypoglycemic attacks, which
2 the ALJ noted. She did not, however, address the high sugar
3 snacks and stopping usage of InPen issues. I find the
4 substantial evidence supports the Administrative Law Judge's
5 reliance on this as one of several factors in evaluating
6 plaintiff's claims.

7 Which brings me to the evaluation of those claims,
8 so-called credibility. The assessment of a plaintiff's
9 subjective complaints are -- must be addressed first to
10 whether the claimant has a medically determinable impairment
11 that could reasonably be expected to produce the alleged
12 symptoms. And, if so, then the ALJ must evaluate both the
13 intensity and persistence of those symptoms and the extent to
14 which they may limit the claimant's ability to perform
15 work-related activity.

16 As I indicated before, it's addressed by SSR 16-3p.
17 When addressing this second prong, the ALJ must consider the
18 objective medical evidence and other evidence in the record,
19 including statements by the claimant and reports from both
20 medical and nonmedical sources and must evaluate the
21 intensity, persistence and limiting effects of the claimant's
22 symptoms by considering various relevant factors that are
23 spelled out both in SSR 16-3p and 20 CFR 404.1529(c)(3) i
24 through vi.

25 And of course the ALJ in this case recited

1 plaintiff's claims at pages 18 to 19 and explained her
2 reasoning for discounting those claims at 19 through 25. I
3 find that the explanation does provide a basis for meaningful
4 judicial review. And of course that determination is
5 entitled to considerable deference if supported by
6 substantial evidence. *Madeline S. v. Commissioner of Social*
7 *Security*, 2022 WL 526233, Northern District of New York
8 January 27, 2022; *Sherry L. v. Kijakazi*, 2022 WL 561563,
9 Northern District of New York, February 24, 2022, and *Aponte*
10 *vs. Secretary of Department of Health and Human Services*, 728
11 F.2d 588, Second Circuit 584.

12 As I indicated before, one, but only one of several
13 factors that were relied on was the failure of plaintiff to
14 follow a prescribed treatment. There was also reliance on
15 objective findings showing many normal observations despite
16 failure of the plaintiff to follow a prescribed treatment.
17 The denial of neuropathy, plaintiff's activities of daily
18 living, including his woodworking at home, which he hoped to
19 make into a business. The fact that seizures apparently were
20 controlled well by medications. An EEG which showed mild
21 results. An MRI testing which showed only a right occipital
22 lobe lesion, various medical opinions. The fact that
23 plaintiff had no mental health treatment despite the fact
24 that Dr. Hartman recommended that he do so.

25 The plaintiff argues that it was -- the ALJ should

1 have considered plaintiff's good work history. Step four
2 shows that the ALJ was aware of plaintiff's work history
3 which clearly is one of many factors, but the failure to
4 mention it is not necessarily fatal. *Wavercak v. Astrue*, 420
5 F. App'x 91, Second Circuit 2011, and *James D. vs.*
6 *Commissioner of Social Security*, 547 F.Supp. 40279, Western
7 District of New York 2021. In my view, the Administrative
8 Law Judge's determination is supported by substantial
9 evidence and not patently unreasonable.

10 The plaintiff challenges the evaluation of medical
11 opinions in the record. Because this application was filed
12 in this case after March 27, 2017, evaluation of medical
13 opinion evidence is subject to new regulations under which
14 the ALJ must articulate how persuasive he or she finds the
15 medical opinions and explain how he or she considered the
16 factors of supportability and consistency of those opinions.
17 20 CFR Section 404.1520(c).

18 In this case, the first challenge is Dr. Hartman's
19 report and medical source statement which appears at 1228 to
20 1231 of the record. In his medical source statement,
21 Dr. Hartman concluded that plaintiff was able to understand,
22 remember and apply simple directions. He was able to
23 maintain personal hygiene and maintain awareness of hazards.
24 He is able to maintain an ordinary routine, mild difficulty
25 in using reason and judgment, mild to moderate difficulty

1 interacting adequately with others, mild to moderate
2 difficulty sustaining concentration, moderate difficulty in
3 understanding, remembering and applying complex directions,
4 and moderate difficulty in regulating emotions.

5 The Administrative Law Judge analyzes and addresses
6 Dr. Hartman's report at several locations in her decision at
7 page 15 and 22 through 24. The Administrative Law Judge at
8 page 15 found the following: There is insufficient evidence
9 with which to find a medically determinable learning
10 disorder, neurocognitive disorder or autism spectrum. Again
11 to establish a medically determinable impairment, medical
12 evidence must establish anatomical, physiological, or
13 psychological abnormalities that can be shown by medically
14 acceptable, clinical and laboratory diagnostic techniques.
15 The record lacks any specific diagnosis of such impairments,
16 including from the claimant's treating neurology records.

17 At page 22 addressing, again, Dr. Hartman, the ALJ
18 noted the following: I have accepted Dr. Hartman's diagnosis
19 of adjustment disorder with mixed anxiety and depression --
20 depressed mood, only when affording extreme deference to
21 subjective reports and when considering the evidence in the
22 light most favorable to the claimant. This is despite the
23 claimant's admission that he had no history of any mental
24 health treatment and with his apparent failure to comply with
25 the Dr. Hartman's recommendation that he pursue such

1 treatment.

2 It's unclear to me exactly how the plaintiff views
3 this as inconsistent with the Administrative Law Judge's
4 determination. And, specifically, the RFC determination.
5 It's well-established that moderate limitations in such
6 mental health areas are not inconsistent with simple work.
7 *Porteus v. O'Malley*, 2024, 2180203 from the Northern District
8 of -- I'm sorry, from the Second Circuit 2024.

9 There is also a challenge to Physician's Assistant
10 Daniel Knef, a treating source opinion. His medical source
11 statement is dated April 19, 2021. It appears at 1216 to
12 1220 of the administrative transcript. It is found to be
13 partially persuasive. The Administrative Law Judge addresses
14 it at 23 to 24 of her decision. It is persuasive with
15 respect to the physical restrictions, but not persuasive on
16 standing and walking, the need for a brace and the absences.
17 Also, it is persuasive in calling for low stress work. The
18 Administrative Law Judge's review of the opinion of
19 Physician's Assistant Knef, in my mind, is appropriate and
20 well-explained.

21 There are prior medical administrative findings at
22 1A and 4A that appear to support the residual functional
23 capacity. They are issued by Dr. Y. Sherer on June 25, 2021,
24 addressing mental capacity, and Dr. J. Rosenthal on May 18,
25 2021, addressing physical capacity. There is also one from

1 March 25, 2021, from Dr. S. Siddiqui, addressing only the
2 physical capacity. They were discussed by the Administrative
3 Law Judge. It is well established that such prior
4 administrative medical findings can supply substantial
5 evidence if they are supported. *Woytowicz v. Commissioner of*
6 *Social Security*, 2016 WL 6427787 from October 5, 2016,
7 Northern District of New York. The report and recommendation
8 at that site was subsequently adopted, 2016 WL 6426385
9 October 28, 2016. They support, for the most part, the
10 Administrative Law Judge's RFC finding. Although the
11 Administrative Law Judge, while accepting Dr. Sherer and
12 Dr. Hartman's opinions actually imposed greater limitations.
13 Dr. Siddiqui did say at page 109 that the plaintiff may need
14 to be absent because of his medical condition. That was not
15 included in Dr. Rosenthal's opinion. In any event, it's
16 not -- it does not qualify as an opinion because it simply
17 says "may." *Lisa A.S. v. Kijakazi*, 2022 WL 4494189 from the
18 Northern District of New York, September 28, 2022.

19 Dr. Zandi's report, as I alluded to earlier, was
20 not before the Administrative Law Judge. It is therefore
21 subject to the analysis under the standard for after acquired
22 or new evidence. The Social Security regulations do
23 authorize the claimant to submit new and material evidence to
24 the Appeals Council when requesting review of an ALJ's
25 decision. 20 CFR 404.970(b). In order to merit the review

1 of the decision by the Appeals Council, the additional
2 evidence must be new material and related to the period on or
3 before the date of the hearing decision and also must show a
4 reasonable probability that such additional evidence would
5 change the outcome of the decision. In this case, the Social
6 Security Administration Appeals Council considered this
7 additional evidence and stated, quote, we find this evidence
8 did not show a reasonable probability that it would change
9 the outcome of the decision. This is at page 2 of the
10 administrative transcript.

11 Clearly, the opinion of Dr. Zandi shows that
12 plaintiff cannot perform complex tasks, but this is not
13 inconsistent with the RFC. I agree that it is close enough
14 in time to relate to the period in question coming only one
15 month after the ALJ's decision, but I also agree with the
16 Appeals Council that there is no reasonable probability that
17 would change the outcome. I note that there is no
18 requirement the Appeals Council elaborate on the substance
19 and consideration of after-acquired evidence. In this case,
20 I do not believe that it would undercut the ALJ's decision.

21 The next argument is that the RFC is not supported.
22 An RFC assessment represents a finding of a range of tasks a
23 claimant is capable of performing, notwithstanding the
24 impairments at issue, and this means a claimant's maximum
25 ability to perform sustained work activities in an ordinary

1 setting on a regular and continuing basis, meaning eight
2 hours a day for five days a week, or an equivalent schedule.
3 *Tankisi v. Commissioner of Social Security*, 521 F. App'x 29,
4 Second Circuit 2013, 20 CFR Section 404.1545(a). It is the
5 burden, of course, on the plaintiff to show any limitations
6 that would impose more than limitations that appear in the
7 RFC. In my view, the plaintiff is requesting a reweighing on
8 the evidence, including the medical opinions. In this case,
9 the ALJ specifically stated she considered all of the
10 plaintiff's impairments, including neuropathy. The RFC is
11 supported by Dr. Siddiqui, Dr. Sherer, Dr. Rosenthal, and not
12 undercut by Dr. Wilson, Zandi, or Physician's Assistant Knef.

13 Regarding absences, Dr. Sherer opined to
14 plaintiff's ability to work within a schedule, maintain
15 attendance, and does not significantly limit it in this
16 regard. That's at 128. There is also a statement that
17 plaintiff can maintain a regular schedule. That's at 131. I
18 don't find that plaintiff carried his burden to show greater
19 limitations.

20 The next argument is concerning step five. The
21 step five determination was based on any testimony --
22 testimony from a vocational expert, which is, of course, the
23 proper means of fulfilling an agency's burden at step five of
24 the disability test. *Bapp v. Bowen*, 802 F.2d 601, Second
25 Circuit 1986.

1 In this case, there was -- the vocational expert
2 testified to three specific jobs that plaintiff is capable of
3 performing that exists in sufficient numbers in the national
4 regional economy, including silverware wrapper, marketing
5 clerk, and routing clerk. Plaintiff argues that plaintiff is
6 incapable of performing level two reasoning jobs. Level two
7 requires the plaintiff to apply commonsense understanding to
8 carry out detailed, but uninvolved written or oral
9 instructions. They must be able to deal with problems
10 involving a few concrete variables in or from standardized
11 situations.

12 And the problem with this argument, of course, is
13 that for 27 years, plaintiff performed in a position,
14 hospital food service worker, that was actually a reasoning
15 level three position, which required him to apply commonsense
16 understanding to carry out instructions furnished in written,
17 oral, or diagramming form, and to deal with problems
18 involving several concrete variables in or from standardized
19 situations.

20 As plaintiff argues, a person's IQ remains
21 relatively stable throughout his or her adult life. And in
22 this case, the fact that plaintiff was able to perform in a
23 level three position for 27 years undermines this argument.

24 In any event, I have found that the residual
25 functional capacity in this case was supported and it's

1 consistent with a level two reasoning position. *Timothy M.*
2 *v. Kijakazi*, 2021 WL 4307445, Northern District of New York
3 2021.

4 In terms of the number of jobs, the regulations
5 state the following: We consider that work exists in the
6 national economy when it exists in sufficient numbers either
7 in the region where you live or in several other regions of
8 the country. It does not matter whether work exists in the
9 immediate area in which you live. That's 20 CFR Section
10 404.1566.

11 In this district, it is well established that
12 anything over 9,000 jobs suffices to meet the Commissioner's
13 burden. *Kelly D. v. Saul*, 2019 WL 6683542 Northern District
14 of New York 2019. The vocational expert was not asked about
15 regions, but the vocational expert testified to jobs totaling
16 171,199. And I think from that, it's safe to infer that jobs
17 exist in sufficient numbers in several other regions of the
18 country, and so I don't find any step five error.

19 Which brings us to an interesting issue. As
20 plaintiff's counsel noted in a submission, which is Docket
21 21, Social Security Administration made an initial level
22 finding of disability with an onset date of October 27, 2020.
23 An explanation of this occurs at page four of the document
24 which provides as follows:

25 While the evidence is sufficient and consistent to

1 support the proposed allowance, the onset date has been
2 established as of October 27, 2020. Evidence shows a prior
3 ALJ denial dated May 4, 2020. As explained -- and there's a
4 citation -- only the SSA component as the same or a higher
5 adjudicative level may reopen an administratively final
6 determination or decision. And it found that there were no
7 exceptions and therefore the earliest possible onset date is
8 May 5, 2022, the day after the ALJ's decision.

9 This determination is apparently based on a mental
10 RFC finding in a prior -- in a state prior administrative
11 medical finding prepared by the Department of Social Services
12 and it finds that the mental RFC justifies an inability to
13 sustain a normal workday/workweek based on plaintiff's
14 inability to sustain even the basic mental demands required
15 for unskilled work.

16 The Commissioner has responded to this in a
17 submission, which appears at Docket 23, stating it is not
18 binding. In oral argument, however, we had a healthy
19 discussion as to the impact of this on the Administrative Law
20 Judge's decision in this case and the Commissioner's ultimate
21 determination.

22 So while I was prepared to uphold the
23 Commissioner's determination in this case based upon my
24 review of the arguments raised by counsel and the record that
25 was before the Administrative Law Judge, and considering the

1 newly-acquired evidence that was before the Appeals Council,
2 in my view, given this determination, which relates to the
3 period at issue and is clearly inconsistent, I believe that
4 the Commissioner's determination should be vacated and the
5 matter remanded. I don't find persuasive evidence of
6 disability at this point. Although I think that ultimately
7 that will be the result based on this finding that he has
8 recently submitted, but -- and I understand
9 Attorney Schneider's argument that reveals the time and that
10 there shouldn't be any undue delay. But nonetheless, I think
11 that caution warrants that the matter be remanded without a
12 directed finding of disability.

13 So I will issue an order to that effect under
14 sentence four, vacating the Commissioner's determination and
15 remanding the matter for further consideration based upon
16 this decision, which will be transcribed and attached to the
17 order. And I appreciate counsels' excellent presentations.
18 I hope you enjoy the rest of your summer.

19 (Court adjourned, 11:58 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, LISA M. MAZZEI, RPR, Official U.S. Court
Reporter, in and for the United States District
Court for the Northern District of New York, DO
HEREBY CERTIFY that pursuant to Section 753, Title
28, United States Code, that the foregoing is a true
and correct excerpt of transcript of the stenographically
reported proceedings held in the above-entitled
matter and that the transcript page format is in
conformance with the regulations of the Judicial
Conference of the United States.

Dated this 26th day of August, 2024.

/S/ LISA M. MAZZEI

LISA M. MAZZEI, RPR
Official U.S. Court Reporter

LISA M. MAZZEI, RPR
Official U.S. Court Reporter